to overrule the objection and require the witness to answer. A witness who nevertheless refuses to answer may be dealt with under O 39 r 5. If he has not been required to answer by the examiner, and refuses to answer, he may be required by the court to answer on a similar ex parte application under O 70 r 6.

She relied on this passage of the judgment and submitted that it was not for the examiner to make a ruling (which in fact he did) that Jack Goh be allowed to refuse to answer questions on the ground of privilege against self-incrimination, and submitted that it is for the court to decide on such a ruling. Hence she asked this court to make an order directing Jack Goh to answer the questions which he refused to answer before the examiner, and she urged the court to follow the principle laid down by Forbes J, that is to say, that other things being equal, it is better for answers which would be inadmissible in the foreign jurisdiction to be recorded (when the foreign court can order them to be struck out) than for answers which might be admissible in that court to be missing because the court here has ruled them inadmissible. Mrs George, however, accepted that our O 66 does not have the corresponding provision of O 70 r 6 of the Rules of the Supreme Court in England, but she contended that s 5(2) of our Act provides in substance what is set out in detail in r 6. At any rate, she argued, we have O 39 r 10 which applies, under which the examiner in this case can act and proceed to record the evidence of Jack Goh, his objections and grounds of objection, and the court can direct Jack Goh to answer those questions on which he claimed privilege against self-incrimination and direct that these answers be set out separately, and then remit them to the requesting court which could then strike them out if they really offend the privilege of self-incrimination.

I am unable to accept her argument and accede to her request for the order. In this case, having regard to para 16 of the letter of request and the ruling already made by the requesting court, s 5(1) of the Act applies and Jack Goh cannot be compelled to give evidence which he could not be compelled to give in those proceedings before the requesting court. The passage of the judgment of Forbes J does not support her case. In that case, there was no statement in the letter of rogatory in support of any privilege; nor was such privilege conceded by the defendant: see the judgment of Forbes J at p 650. It seems to me that the passage of the judgment of Forbes J relied upon by Mrs George would be applicable if s 5(2) of the Act applies, which in this case it does not.

In the result, I dismiss this application with costs to the defendants and Jack Goh.

Application dismissed.

Solicitors: *David Ong & Lim; Colin Ng & Partners; Chor Pee & Co.*

Reported by *Terence Tan Bian Chye*

Dynacast (S) Pte Ltd v Lim Meng Siang & Ors

HIGH COURT (SINGAPORE) - SUIT NO 1140 OF 1989
CHAO HICK TIN JC
25 AUGUST 1989

Civil Procedure - Injunction - Anton Piller order - Affidavit in support of application for order - Failure to state source of belief - Whether failure to make full and frank disclosure - Whether non-disclosure innocent or not - Whether non-disclosure was mere irregularity - Whether order could be discharged after execution - Articles seized under order to be used for another purpose - Rules of the Supreme Court 1970, O 2 r 1, O 41 rr 4, 5(2) & O 92 r 4 - Rules of the Supreme Court 1883 [UK], O 38 r 3

The plaintiffs are manufacturers of plastic and metal components. The defendants are former employees of the plaintiffs. The aim of the present action was to restrain the defendants from using the plaintiffs' confidential and proprietary information and property without the plaintiffs' consent and to require the defendants to return to the plaintiffs all books, equipment, software and other property of the plaintiffs which are in the defendants' possession. The plaintiffs were granted an ex parte Anton Piller order allowing them to enter the defendants' premises to search and seize certain specified documents and articles ('the articles'). This order ('the order') was executed and certain items were seized. The defendants then applied by motion to the court to discharge the order, to order the plaintiffs to return the seized items and to inquire as to the damage suffered by the defendants. It was argued that the plaintiffs had failed to make full and frank disclosure when applying for the order; that there was inadequate evidence before the judge to have granted the order; and that the plaintiffs did not really have a cause of action but were just fishing. The plaintiffs' affidavit in support of the application for the order was affirmed by their managing director.

Held, allowing the defendants' application:

(1) The plaintiffs' statement of claim clearly set out the cause of action and the reliefs sought by the plaintiffs. The application for the order also specified the articles sought. The allegation of fishing was thus unmeritorious.

(2) Recent English cases have stated that although a failure to make full and frank disclosure was sufficient to lead to the court discharging an interim ex parte order, if justice required, the court could exercise its discretion and continue the order or grant a fresh order.

(3) The discretion had to be exercised sparingly and the original non-disclosure had to be innocent. A non-disclosure was innocent where there was no intention to omit or withhold information which was thought to be material.

(4) A judge who grants an interim order without a written application, would have recorded in brief the facts and points mentioned by counsel. Counsel is then expected to swear and file an affidavit setting out what he told the judge. This situation could not be equated with the situation of the plaintiffs in the present case.

(5) The consequences of admitting such evidence could be serious. It could undermine the principle of full and frank disclosure. If there is a point of importance not covered by the affidavit and counsel would like to convey the same to the judge, the proper course would be for counsel to request the judge to

specifically record that point. This, the court understood, was the general practice.

(6) On general policy considerations, the court would not allow in the omitted fact.

(7) As a general rule, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove. An exception is provided by O 41 r 5(2) of the Rules of the Supreme Court 1970 ('RSC') where affidavits sworn for interlocutory proceedings may contain information or belief with the sources and grounds thereof.

(8) Statements of information or belief have no probative value unless the sources and grounds of the information and belief are revealed. Since the affidavit of the plaintiffs did not identify the sources, the relevant paragraphs were inadmissible as the evidence was purely hearsay.

(9) It could not be argued that an omission to state the source is a matter of form, and thus O 41 r 4 of the RSC did not apply.

(10) A failure to state the source was a defect of a fundamental nature. In effect, the failure meant that there was no evidence before the court to warrant the grant of the order, and the court should not overlook this or grant indulgence. Neither did O 92 r 4 regarding the inherent powers of the court to make rules carry the plaintiffs' case any further.

(11) Although the non-disclosure here was due to a misjudgment, the court had some doubts as to whether this could be classified as an innocent non-disclosure. If this were the only ground to decide on the discharge of the order, the court would have hesitated. But coupled with the second ground discussed above, the case for setting aside the order became obvious.

(12) An Anton Piller order could be discharged after it had been executed. If the sole reason for the discharge was to enforce the cross-undertaking in damages, there was no ground for immediate discharge as any issues could be dealt with at the trial of the action.

(13) In the present case, the plaintiffs sought the approval of the court to make use of the articles for another purpose. The present motion to discharge the order was not merely to enforce the undertaking as to damages. The order should thus be discharged. Since there was no urgent need, the inquiry as to damages would be deferred until the trial of the action. Counsel for the defendants had given an undertaking to keep the articles in safe custody until trial. This was sufficient to safeguard the position of both parties until trial.

(14) The interim order was therefore discharged, the articles seized were to be returned to the defendants' solicitors, an inquiry as to damages was to be deferred till trial and the costs of the motion were to be the defendants' in any event.

Cases referred to

1 *R* v *General Commissioners of Income Tax for Kensington* [1917] 1 KB 486 (not folld)
2 *Thermax Ltd* v *Schott Industrial Glass Ltd* [1981] FSR 289 (not folld)
3 *Lloyds Bowmaker Ltd* v *Britannia Arrow Holdings plc* [1988] 3 All ER 178 (folld)
4 *Brink's-MAT Ltd* v *Elcombe & Ors* [1988] 3 All ER 188 (folld)
5 *Dormeuil Frerers SA* v *Nicolian International (Textiles) Ltd* [1988] 3 All ER 197 (folld)
6 *WEA Records Ltd* v *Visions Channel 4 Ltd* [1983] 1 WLR 721 (distd)
7 *Savings and Investment Bank Ltd* v *Gasco* [1984] 1 WLR 271 (folld)
8 *Re JL Young Manufacturing Co Ltd* [1900] 2 Ch 753 (folld)
9 *Booker McConnell plc v Plasgow* [1985] RPC 425 (folld)

Legislation referred to

Rules of the Supreme Court 1970 O 2 r 1, O 41 rr 4, 5(2), O 92 r 4
Rules of the Supreme Court 1883 [UK] O 38 r 3

K Shanmugam for the plaintiffs.
George Lim for the defendants.

Cur Adv Vult

Chao Hock Tin JC: The plaintiffs are manufacturers of small precision metal and plastic components. They are a wholly owned subsidiary of a multinational corporation with headquarters in the United Kingdom. The defendants were formerly the employees of the plaintiffs, having at different times resigned from the employment of the plaintiffs.

The aim of the present action is essentially to restrain the defendants from making use of the plaintiffs' confidential/proprietary information and/or property without the plaintiffs' consent and to require the defendants to return to the plaintiffs all books, equipment, software and other property of the plaintiffs which are in the defendants' possession.

By an ex parte application made to the judge in chambers, the plaintiffs were, on 16 June 1989, granted an Anton Piller order permitting the plaintiffs by their representatives to enter the defendants' premises to search for and remove certain specified documents and articles of the plaintiffs. The Anton Piller order was executed on the same day and the plaintiffs recovered a number of articles and documents pursuant thereto. The things recovered were duly recorded and acknowledged by both parties.

The matter now before me is a motion by counsel for the defendants praying that (i) the interim order made on 16 June 1989 be discharged; (ii) the documents and articles taken by the plaintiffs as a result of the execution of the Anton Piller order be returned to the defendants or their solicitors within three days; and (iii) there be an inquiry as to damages suffered by the defendants.

Counsel for the defendants raised three grounds in support of the contention that the interim order should be discharged. Firstly, there was no full and frank disclosure of material facts on the part of the plaintiffs at the time when the interim order was obtained. Secondly, there was no evidence, or no adequate evidence, before the judge for him to make the interim order. Thirdly, the plaintiffs do not really have any cause of action and are just fishing.

The affidavit in support of the application for the interim order was affirmed by one John Wilson, the managing director of the plaintiffs, and filed on 14 June

1989. In this affidavit, Mr Wilson gave a brief account of the employment of each of the three defendants, together with an indication of the sort of proprietary and confidential information to which each defendant was given access to. At the time of the termination of employment of the first and second defendants, they were each told in writing not to directly or indirectly disclose or use 'any Dynacast confidential information which was gained during your employment with us'. Both the second and third defendants had each, on 15 July 1987, long before their resignation, signed a confidentiality agreement, under which each of them agreed:

> (a) not, directly or indirectly, to disclose or make available to anyone or to use outside the company organization during or after my employment, any confidential information ...
> (b) in the event of termination of my company employment, promptly to deliver to the company all materials ... in my possession or control ...

In the said affidavit, Mr Wilson also stated that it has come to his knowledge that the first defendant has started a business in direct competition with the plaintiffs and has employed the second and third defendants. Then followed two paragraphs which are the paragraphs now under contention before me and it is necessary that I set them out in full:

> 14 It has come to my knowledge, yesterday, that Lim, Lynda and Han are in possession of confidential and proprietary information and articles which were taken from the plaintiffs, without the plaintiffs' knowledge or permission. Annexed hereto and marked 'JGW 5' are the types of property/information that the defendants are likely to have obtained. I have also come to know that the defendants intend to destroy this information and articles should the plaintiffs come to know of the same.
>
> 15 I verily believe that the defendants must have obtained the said information and articles when they were employed by the plaintiffs. The defendants' conduct in this matter has been untrustworthy and questionable. There is a serious risk of the information and articles being destroyed and/or spirited away. Further, the plaintiffs' would suffer irreparable harm should the defendants continue to have access to and use the plaintiffs' information and articles. Accordingly, the plaintiffs pray for an order in terms of this application.

Let me at the outset briefly dispose of the third ground: fishing. The statement of claim sets out clearly what is the cause of action and what reliefs the plaintiffs seek. In the application for the Anton Piller order, they specified what nature of articles and documents they were looking for. Quite clearly, there is no merit in this ground and counsel for the defendants quite rightly did not seriously pursue it.

No full and frank disclosure

The first ground of objection relates to the words 'it has come to my knowledge yesterday' and 'I have also come to know' in para 14 of Mr Wilson's affidavit. Counsel for the defendants submitted that by not disclosing the source of that information there was a lack of full and frank disclosure of a material fact on the part of the plaintiffs and following the decision of the Court of Appeal in *R* v *General Commissioners of Income Tax for Kensington*,[1] the interim order should be discharged without going into the merits. Counsel also cited to me *Thermax Ltd* v *Schott Industrial Glass Ltd*[2] which extended the principle to a situation where the failure to disclose was due to an error of judgment rather than to a deliberate attempt to mislead.

However, the rigour of this principle has in recent years been tempered in a number of cases, eg *Lloyds Bowmaker Ltd* v *Britannia Arrow Holdings PLC*[3] and *Brink's-MAT Ltd* v *Elcombe & Ors*.[4] These authorities led Sir Nicolas Browne-Wilkinson VC in *Dormeuil Freres SA* v *Nicolian International (Textiles) Ltd*[5] to clarify the principle established in the earlier cases thus at p 199:

> It is a basic principle, applicable to all ex parte applications, that a plaintiff seeking ex parte relief must make full disclosure to the court of all facts which are material to the exercise of the court's discretion whether or not to grant the relief. If such disclosure is not made by the plaintiff, the court may discharge the ex parte injunction on that ground alone. But if, in the circumstances existing when the matter comes before the court inter partes, justice requires an order either continuing the ex parte injunction or the grant of a fresh injunction, such an order can be made notwithstanding the earlier failure of the plaintiff to make such disclosure. Moreover, there is authority that, contrary to the law as it was originally laid down, there is no absolute right to have an ex parte order obtained without due disclosure set aside; there is a discretion in the court whether to do so or not.

Of course that discretion, as Balcombe LJ stated in *Brink's-MAT Ltd*[4] at p 194, is one to be exercised sparingly . The original non-disclosure must be innocent. All three members of the Court of Appeal in *Brink's-MAT Ltd*[4] defined an innocent non-disclosure as one where there was no intention to omit or withhold information which was thought to be material.

Paragraph 14 of the affidavit of Mr Wilson clearly did not disclose the source of his information. That is undoubtedly a material fact. At the first hearing before me on 11 August 1989, counsel for the plaintiffs informed the court that at the hearing of the ex parte application, he drew the attention of the Judicial Commissioner to this very point of the source of the information and indicated to the Judicial Commissioner that his clients would prefer to keep the source confidential. Counsel said that the Judicial Commissioner did not require his client to file a supplementary affidavit to disclose the source. Counsel, therefore, submitted to me that there was no question of non-disclosure. However, I should point out that the minutes of the Judicial Commissioner did not record that fact at all.

At the further hearing on 18 August 1989, I suggested to counsel for the plaintiffs that perhaps he should state precisely in an affidavit what he told the Judicial Commis-

sioner at the ex parte hearing. This he did during the mid-day adjournment. Counsel deposed that he told the Judicial Commissioner hearing the ex parte application that:

(b) ... the source of information of Mr Wilson (as to the fact that the defendants were in possession of the plaintiffs' property and intended to destroy it should the plaintiffs take any steps) was an employee of the plaintiffs;
(c) ... the plaintiffs prefer not to state this on affidavit, in order to preserve confidentiality;
(d) ... this employee had been told the above information by the third defendant.

However, counsel for the defendants objected to the filing and service of the affidavit at that late stage. He argued that it did not seem to be appropriate for evidence of such a nature to be introduced in this manner, bearing particularly in mind that the judge's minutes did not mention anything about this aspect at all. He further said that what was stated in para (d) would have to be refuted and he would not have the opportunity to do so without the hearing being further adjourned. Counsel for the plaintiffs in reply said that he would be prepared not to rely on para (d) if that para should pose a problem.

It seems to me that the question whether such evidence as deposed to by counsel for the plaintiffs should be admitted is one of some importance. Counsel relied on *WEA Records Ltd* v *Visions Channel 4 Ltd*[6] to argue that if an interim order could be obtained, in an appropriately urgent case, without any written application or affidavit being filed, subject to an undertaking to file the papers shortly thereafter, surely what the plaintiffs now seek to do is covered by that situation. I am afraid I do not share that view as I do not see the two situations being in parallel. A judge who grants an interim order, without a written application, would have recorded in brief the facts and points mentioned by counsel and counsel is expected to swear and file an affidavit setting out what he told the judge. That situation and the present are different. Having given the matter the most anxious consideration, I am inclined to agree with counsel for the defendants that such evidence should not be admitted. The consequences of admitting such evidence could be serious. It could undermine the principle of full and frank disclosure. It could lead to the opening of the floodgates and to abuse. If there is a point of importance not covered by the affidavit and counsel would like to convey the same to the judge, the proper course would be for counsel to request the judge to specifically record that point. That, I understand, is in fact the general practice. And if the judge has not been requested to make any such recording, then as a matter of policy I do not think it is desirable to permit the introduction of such evidence through a subsequent affidavit. There will be difficulty in verifying the truth of such evidence without having to ask the judge who heard the ex parte application, who in turn might have difficulties in recalling, let alone precisely, what counsel told him. I would not sanction any step which would bring about such a state of affairs. I must hasten to add that in stating the foregoing, I am not for a moment suggesting that what counsel for the plaintiffs deposed to here is not or could not be true. I have ruled based purely on general policy considerations.

No evidence before court to grant Anton Piller order

Turning to the second ground, the argument here rests on O 41 r 5 of the RSC. As a general rule an affidavit may contain only such facts as the deponent is able of his own knowledge to prove. Rule 5(2) of O 9 creates an exception and provides that 'an affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof'. In *Savings and Investment Bank Ltd* v *Gasco*[7] at p 282, Gibson J said:

> To my mind the purpose of r 5(2) is to enable a deponent to put before the court in interlocutory proceedings, frequently in circumstances of great urgency, facts which he is not able of his own knowledge to prove but which, the deponent is informed and believes, can be proved by means which the deponent identifies by specifying the sources and grounds of his information and belief.

In *Re JL Young Manufacturing Company Ltd*[8] it was held that an affidavit of information and belief, not stating the source of the information or belief, was irregular and therefore inadmissible as evidence. Of course, that case was governed by the then rule, O 38 r 3 of the Rules of the Supreme Court 1883, which provided that 'affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted ...'. While the wording of that rule may be different from our present O 41 r 5, I am of the opinion that in substance the meaning of the two rules is the same.

In *Savings and Investment Bank Ltd*,[7] the court applied *Re JL Young Manufacturing Co Ltd*[8] and held that statements of information or belief have no probative value unless the sources and grounds of the information and belief are revealed.

Quite clearly paras 14 and 15 of the said affidavit of Mr Wilson do not identify the source(s) of the information. I accept the submission of counsel for the defendants that without identifying the source, paras 14 and 15 are entirely inadmissible; they are purely hearsay evidence. And without those two paragraphs, there is no evidence and no basis at all for making the Anton Piller order in the instant case.

Counsel for the plaintiffs urged this court to exercise its discretion under O 41 r 4, O 2 r 1 and O 92 r 4 of the RSC and accept the evidence set out in paras 14 and 15 notwithstanding that the source was not disclosed.

Order 41 r 4 provides that 'an affidavit may with leave of the court, be filed or used in evidence notwithstanding

any irregularity in the form thereof'. Now the question is: is an omission to state the source a matter of form? I do not think so. The examples cited in para 41/4/1 of the *Supreme Court Practice 1988* do not appear to support the contention that such an omission is a matter of form. Counsel also argued that as he had orally indicated to the Judicial Commissioner the source, the omission is thus one of form. For the reasons dealt with above under the first ground, I do not think the evidence tendered as to what transpired before the Judicial Commissioner should be admitted. In any event, counsel also admitted that the Judicial Commissioner's attention was never drawn to r 5(2).

As regards O 2 r 1, it provides that a failure to comply with the requirements of the RSC rules, whether in respect of, inter alia, form or content, shall be treated as an irregularity. The court has the power either to set aside wholly or in part the proceedings or to allow amendments to be made. I do not think that a failure of such a kind like the present, which in effect means that there was no evidence before the court warranting the grant of an interim order, is one which this court should overlook and grant indulgence. Order 41 r 5(2) is an exception to the general rule that a person can only depose to what he knows. If a deponent does not comply with O 41 r 5(2), then his evidence is no evidence at all and cannot be relied upon. It is a defect of a fundamental nature.

Finally, as regards O 92 r 4, that rule merely declares that the court has the inherent powers to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. I do not think that that rule carries the case of the plaintiffs any further.

Should the interim order be set aside?

It is clear that non-disclosure of material facts could be a ground for discharging an ex parte interim order. But as stated by Browne-Wilkinson VC in *Dormeuil Freres*[5] there is a discretion in the court. In the present case it seems to me clear that the non-disclosure was due to a misjudgment. Though it was not omitted with the intention to mislead the court, I have some doubts whether this is a case of an innocent non-disclosure as described in *Brinks-MAT Ltd.*[4] Nevertheless if this were the only ground for me to decide whether to set aside the Anton Piller order, I would have hesitated to reflect further. But coupled with the second ground discussed above, the case for setting aside the interim order becomes quite obvious.

One final point: should an Anton Piller order be discharged after it has been executed? In *Booker McConnell* v *Plasgow*[9] the Court of Appeal held that even a fully executed order could be discharged if it is established that it should never have been made. However, Kerr LJ amplified this point further at p 435 as follows:

> If the sole reason for seeking a retrospective discharge of the order is to enforce the cross-undertaking as to damages, then I can see no ground for any immediate application. Any issues as to the validity of the order or as to the consequences of its invalidity should generally be left to be dealt with at the trial of the action.

Dillon LJ expressed very similar views at p 443:

> An application to set aside an Anton Piller order which has not yet been executed has of course to be decided with expedition in order to establish whether or not the order will be executed. It is otherwise where the order has already been fully executed and in such a case the judge to whom application to set aside such an order is made would in my judgment be entitled in his discretion, if he thought fit in a particular case, to direct that the application to set aside the order, with any ancillary matters of costs or of directing an inquiry as to damages on the cross-undertaking, be adjourned to the judge at trial of the action.

In the present case, there is a pending application by the plaintiffs to seek the approval of the court to make use of the articles and documents seized pursuant to the Anton Piller order for another purpose. Therefore, the present motion to discharge the Anton Piller order is not merely to enforce the undertaking as to damages. In the premises, I would order that the Anton Piller order be discharged. But I would order that the inquiry as to damages be deferred until the trial of the action. I do not see any urgent need for the inquiry on damages to be held right away. Indeed, I do not think that it has been shown that any damages had been sustained by the defendants as a result of the execution of the order.

For the record I would state that counsel for the defendants gave this court an undertaking that, if the interim order were discharged, the articles and documents returned would be kept by him in safe custody until trial. It seems to me that that should be sufficient to safeguard the position of both parties until trial.

Accordingly I order: (i) the interim order of 16 June 1989 be discharged; (ii) the articles and documents seized pursuant to the order be returned to the solicitors for the defendants within five days; (iii) an inquiry as to damages, if any, be deferred until trial; and (iv) costs of this motion be the defendants' in any event.

Order accordingly.

Solicitors: *Drew & Napier*; *Wee Tay & Lim.*

Reported by *Terence Tan Bian Chye*